A **VIEW ESTEEM SDN BHD v. BINA PURI HOLDINGS BHD**

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
SURIYADI HALIM OMAR FCJ
ZAHARAH IBRAHIM FCJ
B BALIA YUSOF WAHI FCJ
AZIAH ALI FCJ
[CIVIL APPEAL NO: 02(f)-11-02-2017(W)]
6 NOVEMBER 2017

C ***CONSTRUCTION LAW:*** *Claims – Payment claim – Exclusion clause – Saving clause – Section 41 of Construction Industry Payment and Adjudication Act 2012 ('CIPAA') – Whether payment dispute must be pending or ongoing for it to be excluded – Whether right to exclusion established if claim had previously been commenced in court or arbitration – Words 'commenced' and 'before' in s. 41 –*
D *Whether could be equated with 'pending'*

***CONSTRUCTION LAW:*** *Claims – Payment claim – Defence – Exclusion – Defence not raised in payment response under s. 6(4) but raised under s. 10(1) of CIPAA – Exclusion of defence – Whether amounted to denial of natural justice – Whether sustainable – Construction Industry Payment and Adjudication Act 2012,*
E *ss. 6, 10 & 15*

***CONSTRUCTION LAW:*** *Jurisdiction – Jurisdictional challenge – Jurisdictional challenge on application of CIPAA – Whether could be made any time – Whether could only be made upon application to set aside award under s. 15 – Construction*
F *Industry Payment and Adjudication Act 2012, ss. 15, 16, 27 & 41*

***CONSTRUCTION LAW:*** *Adjudication decision – Stay – Proper approach – Test – Whether law not admitting of any stringent test – Relevant provision of statute – Whether to be liberally construed – Financial capacity of contractor to repay – Whether not predetermined test by itself – Whether court to evaluate each case on*
G *its merit – Construction Industry Payment and Adjudication Act 2012, ss. 15 & 16*

***CONSTRUCTION LAW:*** *Adjudication decision – Stay – Filing of application to stay – Section 16 of CIPAA – Whether application for stay could only be filed after filing of application to set aside award – Whether could be filed together with application to set aside award – Construction Industry Payment and Adjudication*
H *Act 2012, ss. 15 & 16*

***WORDS & PHRASES:*** *'commenced' – 'before' – Section 41 of Construction Industry Payment and Adjudication Act 2012 – Import and purport – Whether to mean 'pending' – Phrase 'payment dispute … which had been commenced in court or arbitration before' – Whether s. 41 applied to pending disputes*

I

This was an appeal against the decision of the Court of Appeal affirming the decision of the High Court which allowed the respondent's application to enforce the decision of the adjudicator in a payment dispute under s. 28 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). Evidently, having allowed the respondent's application, the High Court had also: (i) dismissed the appellant's quest to challenge the adjudicator's jurisdiction under s. 41 of the CIPAA; (ii) ruled that s. 41 of the CIPAA applied to 'pending claims' like the present case, and hence did not exclude the appellant's claim from its scope; (iii) ruled that ss. 5 and 6 of the CIPAA were determinative of jurisdiction, and that the adjudication pleadings under ss. 9 and 11 were merely 'manifestations' of the matters in ss. 5 and 6 of CIPAA; (iv) dismissed the appellant's application to set aside or stay the adjudication decision under ss. 15 and 16 of the CIPAA; (v) affirmed the adjudicator's refusal to consider the defences raised in the adjudication response on the ground that no payment response was filed, dismissing thereby the appellant's contention that the refusal was in breach of the rules of natural justice; and (vi) ruled that no stay could avail the appellant as it failed to show the respondent's inability to repay the adjudication sum.

It was not in dispute that s. 28 of the CIPAA empowered the High Court to enforce an adjudication decision as if it was a judgment or order of the court, that s. 41 of the CIPAA excluded from its application payment disputes that 'had been commenced in any court or arbitration before the coming into operation of CIPAA', and that ss. 15 and 16 of the CIPAA respectively set out the grounds upon which an adjudication decision could be set aside and the circumstances under which a stay order could be granted by the court. The facts further showed that while the CIPAA came into force on 14 April 2014, the present claim before the adjudication tribunal, which centred on the appellant's progress claim No. 28 valued at RM23.8 million, and which was cumulative of earlier progressive claims, was filed in May 2013. Be that as it may, after having been granted leave to appeal, eight questions of law were allowed to be posed to the learned justices of the apex court for their deliberations and determination, namely: (i) whether a jurisdictional challenge on the application of CIPAA could be made any time by way of application, or only upon an application to set aside an award under s. 15 of the CIPAA; (ii) whether s. 41 of the CIPAA excluded a claim if it was brought to court or arbitration prior to the coming into force of the CIPAA; (iii, iv, v & vi) whether s. 6(4) of the CIPAA allowed a responding party to raise matters not raised in the payment response under s. 6(2) of the CIPAA, and whether under s. 26 of the CIPAA the adjudicator could remedy any non-compliance with the said s. 6(2) – and if that be so – whether the exclusion of a defence that has not been raised in the payment response under s. 6(4) but raised under s. 10(1) of the CIPAA amounted to a denial of natural justice under s. 15 of the CIPAA; (vii) whether a stay under s. 16 of the

CIPAA could be granted to remedy an injustice or an error arising in an award; and (viii) whether an application for stay under s. 16 of CIPAA could be made concurrently with an application to set aside an award under s. 15 thereof.

**Held (allowing appeal; setting aside orders of High Court and Court of Appeal; allowing appellant's application to challenge the jurisdiction of adjudicator under s. 41 of CIPAA; allowing appellant's application to set aside award under ss. 15 and 16 of CIPAA; dismissing respondent's application to register and enforce adjudication decision)**
**Per Zulkefli Ahmad Makinudin PCA delivering the judgment of the court:**

**(1)** The Court of Appeal erred in ruling that the s. 41 issue taken by the appellant should be dismissed *in limine* because it was brought as a separate application and not as an application under s. 15 of the CIPAA to set aside the adjudication decision. The Court of Appeal failed to distinguish between a case where the CIPAA did not apply at all and a case where it applies but the adjudicator acting under the CIPAA had exceeded his jurisdiction. (para 12)

**(2)** The jurisdiction spoken of in s. 15(d) of the CIPAA are in circumstances where the CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction. By s. 27(2) of the CIPAA, the parties may however, by consent, extend the jurisdiction of the adjudicator to decide on matters outside the claim on which he first acquired jurisdiction. (para 15)

**(3)** The term 'jurisdiction' under the CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of the CIPAA. The common feature in all the various types of jurisdictional complaints within the CIPAA is the presupposition that the CIPAA applies to determine if the adjudicator had kept within his jurisdiction. (paras 16 & 17)

**(4)** The error in the judgment of the Court of Appeal is the failure to recognise that the jurisdictional complaint in the present case is that the CIPAA did not apply at all because of s. 41, and not an 'excess of jurisdiction' under s. 15 on the basis that the CIPAA applied. It is what is termed as an absolute lack of jurisdiction which may be taken up at any time. (para 18)

**(5)** The appellant had rightly not invoked s. 15 of the CIPAA at the beginning in making its application to challenge jurisdiction because it could not, on the one hand, complain that the CIPAA did not apply to the case and yet, on the other hand, invoke a provision of the CIPAA to seek relief. In the circumstances, the answer to question (i) posed was in the positive in the first part and negative in the second part. (para 19)

**(6)** Contrary to the finding of the High Court, the word 'commenced' in s. 41 of the CIPAA is not the same as the word 'pending' which is not found in the said section. The High Court further ignored the word 'before' in s. 41 of the CIPAA. If it was intended by the Legislature that s. 41 of the CIPAA should apply to 'pending' claims then such word should have been used as seen in s. 16(1)(b) of the CIPAA or the word 'concurrently' in s. 37(1) of the CIPAA in respect of the ongoing claims. The words 'commenced' and 'before' as found in s. 41 of the CIPAA, therefore, have distinct meanings and should not be equated with the word 'pending' found elsewhere the in CIPAA. (para 27)

**(6a)** The arguments against reading the words 'commenced' and 'before' as meaning 'pending' is strengthened by the context in which the words appear namely 'had been commenced'. It refutes any suggestion that the payment dispute must be pending or ongoing for it to be excluded. Both the adjudicator and the High Court had read s. 41 of the CIPAA wrongly by interpreting the exclusion thereon as applicable to pending disputes. This interpretation narrowed the scope of s. 41 of the CIPAA and was contrary to its intended operation as a saving and transitional provision. (para 28)

**(7)** It is sufficient to establish a right of exclusion, under s. 41 of the CIPAA, if the paying party demonstrates that a claim had previously been commenced in court or arbitration. This is based on the fact that in the construction industry, progress claims are cumulative in nature and do not exist in separate stand-alone compartments. Hence, s. 41 of the CIPAA applied to exclude the respondent's claim under progress claim 28 for RM23.8 million, as the matter fell under the word 'commenced' and 'before' in the section. Question (ii) would thus be answered in the affirmative. (paras 32 & 35)

**(8)** As for questions (iii) to (vi), which related to whether the adjudicator could exclude the defences of the appellant, it was firstly untenable of the High Court to reduce the adjudication pleadings in ss. 9 and 11 of the CIPAA to mere 'formal manifestations' of the dispute. If it were so, it would be easier for the legislative draftsmen to dispense altogether with adjudication pleadings and proceed purely on the statements contained in the payment claim and the payment response under ss. 5 and 6 of the CIPAA. (para 41)

**(9)** The right to disregard the so-called new ground is not based on any express power vested in the adjudicator, but solely by a reliance on s. 27(1) of the CIPAA which limits the dispute to 'the matter referred to the adjudicator pursuant to ss. 5 and 6'. There is the need to determine the scope of the jurisdictional limitation under s. 27(1) and

whether it justified the adjudicator to exclude the defences raised by a respondent. Further, in the context and application of s. 27(1), the distinction between 'jurisdiction' and 'powers' must be recognised. (paras 51 & 52)

**(10)** The significance of the divide between 'jurisdiction' and 'powers' lies in the fact that 'jurisdiction' relates to 'the types of subject matter which the court may deal with' whereas its powers may be exercised only in relation to that jurisdiction. (para 53)

**(10a)** Section 27(1) of the CIPAA refers to the subject matter of the claim under s. 5 of the CIPAA, which is the 'cause of action' identified by the claimant by reference to the applicable clause of the construction contract. Thus, if the payment claim relates to progress payment no. 28 as in the present case, the 'jurisdiction' of the adjudicator is limited to this progress claim and nothing else, although, by s. 27(2), the parties may by consent extend the jurisdiction to cover other matters. In contrast, the 'powers' of the adjudicator is listed in ss. 25 and 26. It follows that an adjudicator may exercise all or any of the powers under these sections so long as he keeps within his jurisdiction in adjudicating only the subject matter referred to him pursuant to ss. 5 and 6 of the CIPAA. It follows further, that, in the absence of any prohibitory clause in the CIPAA, there is no impediment for the adjudicator to consider all the grounds of claim in an adjudication claim under s. 9 of the CIPAA, and all the grounds of defence in an adjudication response under s. 10 of the CIPAA. (paras 56-59)

**(11)** The High Court had treated s. 6(4) of the CIPAA (if the non-paying party fails to respond to the payment claim he is 'deemed to have disputed the entire payment claim') as equivalent to an anti-default judgment provision which merely gives 'comfort' to the respondent. This approach by the High Court fails to give due regard to the significance of the section as a 'deeming' provision. The interpretation that s. 6(4) of the CIPAA would only entitle the respondent to dispute the claim as it stands, and not raise any positive defence, has whittled down the effect of the deeming provision. Section 6(4), by its effect, does not prevent the respondent from submitting any defence available to him by way of an adjudication response. (paras 60-62)

**(12)** By his duties and obligations as spelt out in s. 24(c) of the CIPAA, the adjudicator must 'comply with the principles of natural justice'. Hence, as a matter of fairness and impartiality, the adjudicator must consider all the defences raised by the appellant in the adjudication response. On the facts, the adjudicator had wrongly construed the scope of his jurisdiction under s. 27(1) of the CIPAA in refusing to consider all the defences raised in the adjudication response. Such a decision by the adjudicator could not stand. (paras 64-66)

**(12a)** Bearing in mind *Pilon Ltd v. Breyer Group Plc*, an adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s. 6 of the CIPAA or not. In the circumstances, the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision could not likewise stand for that reason. (paras 71-74)

**(13)** On question (vii), a more liberal reading of s. 16 of the CIPAA allows for some degree of flexibility to the courts to stay the award where there are clear errors and to meet the justice of the individual case. In any case, to restrict the application of s. 16 of the CIPAA in the manner proposed by the High Court and the Court of Appeal would strip the section of any utility. A stringent test is not justified because s. 16 of the CIPAA itself contains no limiting requirement or intent. Consequently, the correct approach for the High Court under s. 16 of the CIPAA would be to evaluate each case on its merits without the fetter of a predetermined test not found in the section itself, namely the financial capacity of the contractor to repay. It could be a factor but not the only factor. (paras 79, 82 & 84)

**(14)** In respect of question (viii), the facts showed that the Court of Appeal held that an application under s. 16 of the CIPAA for stay could only be made after the filing of an application under s. 15 of the CIPAA. The Court of Appeal fell into error when it failed to consider that the application for stay was made under s. 16(1)(b), and not s. 16(1)(a) of the CIPAA. In any event, s. 16(1)(a) specifically provides that parties may apply for stay once an application to set aside an award under s. 15 of the CIPAA has been made. It does not say that the application must be made separately. (para 85)

**(15)** It was wholly appropriate that an application for stay under s. 16 of the CIPAA be filed together with an application to set aside an award under s. 15 of the CIPAA as a matter of practical utility for the High Court to make the appropriate order in a joint consideration of both. For these reasons, questions (vii) and (viii) were answered in the affirmative. (paras 86 & 87)

***Bahasa Malaysia** Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan yang mengesahkan keputusan Mahkamah Tinggi yang membenarkan permohonan responden untuk melaksanakan keputusan adjudikator dalam satu pertikaian pembayaran bawah s. 28 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA'). Keterangan menunjukkan, setelah membenarkan permohonan responden, Mahkamah Tinggi juga: (i) menolak permohonan perayu untuk mencabar bidang kuasa adjudikator bawah s. 41 CIPAA;

(ii) memutuskan bahawa s. 41 CIPAA terpakai pada 'pending claims' seperti kes semasa, dan oleh itu tidak menyingkir tuntutan perayu dari skopnya; (iii) memutuskan bahawa ss. 5 dan 6 CIPAA adalah penentu bidang kuasa dan bahawa pliding adjudikasi bawah ss. 9 dan 11 hanyalah 'manifestasi' perkara-perkara dalam ss. 5 dan 6 CIPAA; (iv) menolak permohonan perayu untuk mengetepi atau menggantung keputusan adjudikasi bawah ss. 15 dan 16 CIPAA; (v) mengesah keengganan adjudikator untuk menimbang pembelaan-pembelaan yang dibangkitkan dalam respons adjudikasi kerana tiada respons pembayaran difailkan, sekali gus menolak hujah perayu bahawa keengganan tersebut melanggar tatasusila keadilan asasi; dan (vi) memutuskan bahawa tiada penggantungan boleh dimanfaat oleh perayu atas kegagalannya membuktikan ketidakupayaan responden untuk membayar jumlah adjudikasi.

Tidak dinafikan bahawa s. 28 CIPAA memberi kuasa kepada Mahkamah Tinggi untuk melaksanakan keputusan adjudikasi seolah-olah satu penghakiman atau perintah mahkamah, bahawa s. 41 CIPAA menyingkir dari rangkumannya pertikaian-pertikaian pembayaran yang 'telah dimulakan di mana-mana mahkamah atau timbang tara sebelum CIPAA berkuat kuasa', dan bahawa ss. 15 dan 16 CIPAA masing-masing menyenaraikan alasan-alasan yang membolehkan keputusan adjudikasi diketepikan dan hal-hal keadaan apabila perintah penggantungan boleh diberi oleh mahkamah. Fakta seterusnya menunjukkan bahawa, sementara CIPAA mula berkuat kuasa pada 14 April 2014, tuntutan semasa di tribunal adjudikasi, yang tertumpu pada tuntutan progres No. 28 perayu bernilai RM23.8 juta, iaitu tuntutan kumulatif tuntutan-tuntutan terdahulu, telah difail pada bulan Mei 2013. Walau apapun, setelah diberi kebenaran merayu, lapan soalan undang-undang dibenarkan untuk dikemukakan pada yang arif hakim-hakim mahkamah tertinggi untuk penelitian dan keputusan mereka, iaitu: (i) sama ada satu tentangan bidang kuasa berkaitan keterpakaian CIPAA boleh dibuat bila-bila masa melalui permohonan, atau hanya jika permohonan untuk mengetepikan award bawah s. 15 CIPAA telah dibuat terlebih dahulu; (ii) sama ada s. 41 CIPAA menyingkir mana-mana tuntutan yang dibawa ke mahkamah atau timbang tara sebelum CIPAA berkuat kuasa; (iii, iv, v & vi) sama ada s. 6(4) CIPAA membenarkan pihak yang menjawab membangkitkan hal-hal yang tidak dibangkit dalam respons pembayaran bawah s. 6(2) CIPAA, dan sama ada bawah s. 26 CIPAA, adjudikator boleh meremedi ketidakpatuhan terhadap s. 6(2) tersebut – dan jika itulah kedudukannya – sama ada penyingkiran pembelaan yang tidak dibangkitkan dalam respons pembayaran bawah s. 6(4) tetapi dibangkitkan bawah s. 10(1) CIPAA ialah satu tindakan yang menentang keadilan asasi bawah s. 15 CIPAA; (vii) sama ada penggantungan bawah s. 16 CIPAA boleh diberi untuk meremedi suatu ketidakadilan atau suatu kekhilafan yang berlaku dalam sesuatu award; dan (viii) sama ada satu permohonan penggantungan bawah s. 16 CIPAA boleh dibuat bersekali dengan permohonan mengetepikan award bawah s. 15 CIPAA.

**Diputuskan (membenarkan rayuan; mengetepikan perintah-perintah Mahkamah Tinggi dan Mahkamah Rayuan; membenarkan permohonan perayu mencabar bidang kuasa adjudikator bawah s. 41 CIPAA; membenarkan permohonan perayu mengetepikan award bawah ss. 15 dan 16 CIPAA; menolak permohonan responden untuk mendaftar dan menguatkuasa keputusan adjudikasi)**

**Oleh Zulkefli Ahmad Makinudin PMR menyampaikan keputusan mahkamah:**

**(1)** Mahkamah Rayuan terkhilaf bila mendapati isu s. 14, seperti yang dibangkitkan oleh perayu, patut ditolak *in limine* kerana dibangkitkan dalam permohonan yang berbeza dan tidak sebagai satu permohonan tunggal bawah s. 15 CIPAA untuk mengetepikan keputusan adjudikasi. Mahkamah Rayuan gagal membezakan kes di mana CIPAA langsung tidak terpakai dan kes di mana ini terpakai tetapi adjudikator bertindak melangkaui bidang kuasanya.

**(2)** Bidang kuasa yang diperkata oleh s. 15(d) CIPAA adalah hal keadaan jika CIPAA terpakai dan jika pertikaian wujud dalam keadaan adjudikator memastikan dirinya mempunyai bidang kuasa. Bawah s. 27(2) CIPAA, pihak-pihak bagaimanapun boleh dengan sukarela melebarkan bidang kuasa adjudikator untuk memutuskan perkara-perkara luar tuntutan yang beliau pada awalnya mempunyai bidang kuasa.

**(3)** Perkataan 'bidang kuasa' bawah CIPAA tidak diguna sebagai terma pentadbiran atau undang-undang awam tetapi dalam hubungannya dengan hal-hal yang dirangkumi CIPAA. Unsur lazim dalam semua jenis bantahan bidang kuasa bawah CIPAA adalah andaian bahawa CIPAA terpakai untuk menentukan sama ada adjudikator berada dalam bidang kuasanya.

**(4)** Kekhilafan pada keputusan Mahkamah Rayuan adalah kegagalan memahami bahawa bantahan bidang kuasa dalam kes semasa adalah bahawa CIPAA tidak terpakai langsung disebabkan oleh s. 41, dan bukannya soal 'lewahan bidang kuasa'' bawah s. 15 atas asas CIPAA terpakai.

**(5)** Perayu betul dalam tidak mengguna pakai s. 15 CIPAA pada awalnya semasa membuat permohonan mencabar bidang kuasa kerana tidak boleh, di satu pihak, membantah bahawa CIPAA tidak terpakai sementara, pada masa yang sama, mengguna pakai peruntukan CIPAA memohon remedi. Oleh itu, jawapan kepada soalan (i) yang dikemukakan adalah positif untuk bahagian pertama dan negatif untuk bahagian kedua.

**(6)** Bertentangan dengan dapatan Mahkamah Tinggi, perkataan 'dimulakan' di s. 41 CIPAA tidak sama dengan perkataan 'sedang menunggu keputusan' ('pending') yang tidak wujud dalam seksyen tersebut. Mahkamah Tinggi juga tidak mempedulikan perkataan 'sebelum' dalam s. 41 CIPAA. Sekiranya badan perundangan berniat bahawa s. 41 CIPAA harus terpakai pada tuntutan-tuntutan yang sedang menunggu keputusan (pending), perkataan seumpama itu harus digunakan sepertimana yang terlihat dalam s. 16(1)(b) CIPAA, atau seperti perkataan 'concurrently' dalam s. 37(1) CIPAA berhubung dengan tuntutan-tuntutan yang sedang berjalan. Perkataan 'dimulakan' dan 'sebelum' seperti yang terdapat pada s. 41 CIPAA dengan itu mempunyai maksud yang berbeza dan tidak harus disamakan dengan perkataan 'pending' yang terdapat di tempat-tempat lain CIPAA.

**(6a)** Hujah menolak membaca perkataan 'dimulakan' dan 'sebelum' sebagai bermakna 'sedang menunggu keputusan' diperkuat oleh konteks perkataan tersebut terzahir, iaitu 'had been commenced'. Ini bercanggah dengan cadangan yang mengatakan bahawa pertikaian pembayaran mestilah satu pertikaian yang sedang berjalan atau yang menunggu keputusan sebelum layak disingkir. Kedua-dua adjudikator dan Mahkamah Tinggi terkhilaf dalam mentafsir s. 41 CIPAA apabila mengatakan penyingkiran sebagai terpakai pada pertikaian yang sedang menunggu keputusan. Tafsiran tersebut menyempitkan skop s. 41 CIPAA dan bertentangan dengan suatu peruntukan penyelamat atau peralihan.

**(7)** Bagi membuktikan kebolehsingkiran bawah s. 41 CIPAA, memadai untuk pihak yang membayar menunjukkan bahawa tuntutan telah pun dimulakan sebelum itu di mahkamah atau timbang tara. Ini berdasarkan fakta bahawa dalam industri pembinaan tuntutan progres adalah bersifat kumulatif dan tidak wujud secara sendirian. Oleh itu, berdasarkan fakta, s. 41 CIPAA terpakai untuk menyingkirkan tuntutan responden bawah tuntutan progres 28 berjumlah RM23.8 juta, kerana ia dirangkum oleh perkataan 'dimulakan' dan 'sebelum' dalam seksyen tersebut. Maka soalan (ii) dijawab secara afirmatif.

**(8)** Berhubung soalan (iii) hingga (vi), yang berkait dengan sama ada adjudikator boleh menyingkir pembelaan perayu, tidak munasabah untuk Mahkamah Tinggi merendahkan pliding-pliding adjudikasi bawah ss. 9 dan 11 CIPAA hanya sebagai 'manifestasi formal' pertikaian. Jika itulah keadaannya, maka lebih mudah untuk penggubal undang-undang mengetepikan langsung piliding adjudikasi dan meneruskan semata-mata dengan kenyataan-kenyataan yang dibuat dalam tuntutan pembayaran dan respons pembayaran bawah ss. 5 dan 6 CIPAA.

**(9)** Hak mengetepi apa-apa yang dianggap sebagai alasan baharu tidak didasar pada mana-mana kuasa nyata yang diberi pada adjudikator, tetapi hanya melalui pergantungan pada s. 27(1) CIPAA yang mengehadkan pertikaian pada 'perkara yang dirujuk kepada adjudikator di bawah ss. 5 dan 6'. Oleh itu, terdapat keperluan menentukan skop keterhadan bidang kuasa bawah s. 27(1) dan sama ada wujud justifikasi untuk adjudikator menyingkir pembelaan yang dibangkit oleh seorang responden. Begitu juga, dalam konteks dan pemakaian s. 27(1), perbezaan antara 'bidang kuasa' dan 'kuasa' perlu diakui dan difahami.

**(10)** Peri pentingnya perbezaan antara 'bidang kuasa' dan 'kuasa' terletak pada fakta bahawa 'bidang kuasa' berkait dengan 'jenis hal perkara yang boleh ditangani oleh mahkamah' sementara 'kuasa'nya hanya boleh dilaksanakan dalam skop bidang kuasanya tersebut.

**(10a)** Seksyen 27(1) CIPAA merujuk pada hal perkara tuntutan bawah s. 5 CIPAA, yang merupakan 'kausa tindakan' yang dikenal pasti oleh penuntut dengan merujuk pada klausa kontrak binaan terbabit. Oleh itu, jika tuntutan bayaran merujuk pada bayaran progres No. 28 seperti kes ini, maka bidang kuasa adjudikator adalah terhad pada tuntutan progres tersebut dan tidak yang lain-lain, walaupun, bawah s. 27(2), pihak-pihak boleh dengan sukarela mengembangkan bidang kuasa bagi merangkumi perkara-perkara lain. Sebaliknya, 'kuasa' adjudikator disenarai di bawah ss. 25 dan 26. Diikuti bahawa adjudikator boleh melaksanakan mana-mana satu atau semua kuasanya bawah seksyen-seksyen ini selagi beliau bertindak mengikut bidang kuasanya dengan mengadili hanya perkara-perkara yang dibawa kepadanya bawah ss. 5 dan 6 CIPAA. Diikuti seterusnya bahawa, dengan ketiadaan apa-apa klausa mengekang dalam CIPAA, tiada halangan bagi adjudikator untuk menimbang semua alasan-alasan dalam tuntutan adjudikasi bawah s. 9 CIPAA, serta semua alasan-alasan dalam respons pembelaan bawah s. 10 CIPAA.

**(11)** Mahkamah Tinggi melihat s. 6(4) CIPAA (jika pihak tidak membayar gagal membalas tuntutan bayaran maka ia 'dianggap sebagai mempertikai keseluruhan tuntutan bayaran') sebagai bersamaan dengan peruntukan anti-penghakiman-ingkar yang hanya memberi 'kelunakan' kepada responden. Pendekatan sedemikian oleh Mahkamah Tinggi gagal mengambil kira peri pentingnya seksyen tersebut sebagai peruntukan 'deeming'. Tafsiran bahawa s. 6(4) CIPAA hanya membolehkan responden mempertikai tuntutan seadanya, dan tidak boleh membangkit pembelaan positif, telah menjejaskan kesan peruntukan *deeming* tersebut. Seksyen 6(4), secara berkesannya, tidak menghalang responden mengemukakan sebarang pembelaan yang terbuka kepadanya melalui respons adjudikasi.

**(12)** Berdasarkan tugas dan tanggungjawabnya seperti yang digaris oleh s. 24(c) CIPAA, adjudikator perlu 'mematuhi prinsip-prinsip keadilan asasi'. Oleh itu, sebagai satu perkara keadilan dan tidak memihak, adjudikator mesti menimbang semua pembelaan yang dibangkitkan oleh perayu dalam respons adjudikasi. Berasaskan fakta, adjudikator telah menyalah tafsir skop bidang kuasanya di bawah s. 27(1) CIPAA apabila enggan menimbang semua pembelaan yang dibangkitkan dalam respons adjudikasi. Keputusan sedemikian rupa oleh adjudikator tidak boleh dipertahankan.

**(12a)** Mengambil kira kes *Pilon Ltd v. Breyer Group Plc*, adjudikator tidak dihalang daripada menimbang semua pembelaan yang dibangkitkan oleh responden dalam respons adjudikasi, sama ada dibangkitkan dalam respons pertama bawah s. 6 CIPAA atau sebaliknya. Dalam hal keadaan kes, adjudikator telah bertindak melanggar keadilan asasi apabila menyingkir dan enggan menimbang beberapa pembelaan yang dibangkitkan perayu. Atas sebab itu, keputusannya juga tidak boleh dipertahankan.

**(13)** Berhubung soalan (vii), pembacaan secara lebih liberal s. 16 CIPAA memberikan mahkamah fleksibiliti menggantung award apabila terdapat kesilapan-kesilapan yang jelas dan untuk memenuhi keadilan satu-satu kes. Apapun, mengehadkan pemakaian s. 16 CIPAA seperti yang dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan akan mensia-siakan kegunaan seksyen tersebut. Satu ujian yang ketat adalah tidak berjustifikasi kerana s. 16 CIPAA sendiri tidak mengandungi apa-apa peruntukan kekangan atau tujuan untuk mengekang. Oleh itu, pendekatan yang betul bagi Mahkamah Tinggi bawah s. 16 CIPAA adalah untuk menilai setiap kes berdasarkan meritnya, tanpa dikekang oleh apa-apa ujian terdahulu yang tidak ada dalam seksyen tersebut, iaitu keupayaan kewangan kontraktor untuk membayar. Ini mungkin satu faktor, tetapi bukan satu-satunya faktor.

**(14)** Berkaitan soalan (viii), fakta menunjukkan Mahkamah Rayuan mendapati satu permohonan bawah s. 16 CIPAA untuk penggantungan hanya boleh dibuat selepas satu pemfailan bawah s. 15 CIPAA. Mahkamah Rayuan terkhilaf kerana gagal melihat bahawa permohonan penggantungan sebenarnya dibuat bawah s. 16(1)(b), dan bukannya s. 16(1)(a) CIPAA. Walau apa pun, s. 16(1)(a) memperuntukkan secara spesifik bahawa pihak-pihak boleh memohon penggantungan sebaik sahaja satu permohonan untuk mengetepikan award bawah s. 15 dibuat. Tidak dikatakan bahawa permohonan tersebut perlu dibuat berasingan.

**(15)** Amat wajar untuk satu permohonan penggantungan bawah s. 16 CIPAA difailkan bersekali dengan permohonan mengetepikan award bawah s. 15 CIPAA untuk memberi keselesaan kepada Mahkamah Tinggi membuat perintah yang sewajarnya setelah menimbang kedua-dua permohonan secara bersesama. Atas alasan-alasan ini, soalan (vii) dan (viii) dijawab secara afirmatif.

**Case(s) referred to:**

*Britnell v. Secretary of State for Social Security [1991] 2 All ER 726* ***(refd)***
*Chip Hup Hup Kee Construction Pte Ltd v. Ssangyong Engineering & Construction Co Ltd [2010] 1 SLR 658* ***(refd)***
*Ex p Walton [1881] 17 Ch D 746* ***(refd)***
*In Re Thompson Bedford v. Teal [1890] 45 Ch D 161* ***(refd)***
*Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 HC* ***(refd)***
*Lim Phin Khian v. Kho Su Ming @ Seng Meng [1996] 1 CLJ 529 SC* ***(refd)***
*Multiplex Construction Pty Ltd v. Luikens & Anor [2003] NSWSC 1140* ***(refd)***
*Pilon Ltd v. Breyer Group plc [2010] EWHC 837 (TCC)* ***(refd)***
*St Aubyn (LM) & Ors v. Attorney General (No 2) [1951] 2 All ER 473* ***(refd)***
*Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] 1 LNS 177 HC* ***(refd)***
*UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC* ***(refd)***
*WY Steel Construction Pte Ltd v. Osko Pte Ltd [2013] 3 SLR 380* ***(refd)***

**Legislation referred to:**

Construction Industry Payment And Adjudication Act 2012, ss. 2, 3, 4, 5(2)(b), 6(2), (4), 8(3), 9(1), 10(1), 11, 12, 15(d), 16(1)(a), (b), 24(c), 25, 26(2)(c), 27(1), (2), (3), 28, 32, 37(1), 41

Arbitration Act 1996 [UK], s. 42
Building and Construction Industry Security of Payment Act 2006 (Cap 30B) [Sing], ss. 15(3), 18
Building and Construction Industry Security of Payment Act 1999 [NSW], s. 20(2B)
Construction Contracts Act 2002 [NZ], ss. 17, 73
The Scheme for Construction Contracts (England and Wales) Regulations 1998 [UK] Schedule, regs. 1, 20, 24

**Other source(s) referred to:**

Julian Bailey, *Construction Law,* vol 1, para 6.59
Lam Wai Loon & Ivan YF Loo, *Construction Adjudication in Malaysia,* KL CCH Asia 2013, p 150

*For the appellant - Cyrus Das, Chetan Jethwani & Goh Hui Ring; M/s Kumar Partnership*
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*[Editor's note: For the Court of Appeal judgment, please see View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2017] 1 CLJ 677 (overruled in part).]*

*[Editor's note: Please also note that our print report of the Court of Appeal judgment carried only the judgment of Justice Hamid Sultan without the supporting judgment of Justice Prasad Sandosham Abraham. We received Justice Hamid's judgment much earlier than*

*Justice Prasad's, and there being no indication of any supporting judgment coming forth, proceeded to publish Justice Hamid's judgment in the journal. Both judgments are nonetheless available in our online report.]*

*Reported by Wan Sharif Ahmad*

## JUDGMENT

**Zulkefli Ahmad Makinuddin PCA:**

**Background Facts**

**[1]** This is an appeal by the appellant against the decision of the Court of Appeal affirming the decision of the High Court in relation to three applications filed by the appellant and the respondent at the High Court on issues pertaining to the relevant provisions of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

**[2]** The three applications by way of originating summonses relate to the same adjudication claim and had been consolidated and heard together.

**[3]** The three applications are as follows:

(i) The first application was made by the appellant to challenge the jurisdiction of the adjudicator under the provision of s. 41 of CIPAA. The said s. 41 reads as follows:

> **Savings**
>
> 41. Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.

(ii) The second application was made by the respondent seeking the registration and enforcement of the adjudication decision as a judgment of the court pursuant to s. 28 of CIPAA. The said s. 28 reads as follows:

> **Enforcement of adjudication decision as judgment**
>
> 28(1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
>
> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
>
> (3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

(iii) The third application was made by the appellant to set aside and/or stay the award of the adjudication pursuant to ss. 15 and 16 of CIPAA. The said ss. 15 and 16 read as follows:

**Improperly Procured Adjudication Decision**

15. An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

a. the adjudication decision was improperly procured through fraud or bribery;

b. there has been a denial of natural justice;

c. the adjudicator has not acted independently or impartially; or

d. the adjudicator has acted in excess of his jurisdiction.

**Stay of Adjudication Decision**

16(1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

a. an application to set aside the adjudication decision under section 15 has been made; or

b. the subject matter of the adjudication decision is pending final determination by arbitration or the court.

(2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

**[4]** The learned judge of the High Court dismissed both of the appellant's applications and allowed the respondent's application to enforce the adjudication decision. The Court of Appeal affirmed all the three decisions of the High Court.

**[5]** The following are the questions of law approved by the Federal Court in this appeal:

(1) Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") can be made any time by way of application or whether such an application can only be made upon the application to set aside an Adjudication Award under section 15 of the CIPAA;

(2) Whether section 41 of the CIPAA operates to exclude any proceedings from the operation of the CIPAA if the whole or any part of such a claim has been brought to court or Arbitration prior to the coming into force of the CIPAA;

(3) Whether section 6(4) of the CIPAA allows a responding party to raise matters not raised in Payment Response under section 6(2) of the CIPAA during the filing of the Adjudication Response under section 10(1) of the CIPAA;

A (4) If the answer to question (3) above is in the affirmative, whether the exclusion of a defence that has not been raised in the Payment Response under section 6(4) but raised under section 10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

B (5) Whether the adjudicator has the power under section 26 of the CIPAA to remedy any non-compliance with section 6(2) of the CIPAA;

(6) If the answer to question (5) is in the affirmative, whether the exclusion of a defence that has not been raised in the Payment Response under section 6(4) but raised under section 10(1) of the C CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

(7) Whether an application for stay or partial stay on terms under section 16 of the CIPAA can be granted to remedy an injustice caused by a breach of natural justice or errors arising in an D adjudication award; and

(8) Whether an application for a stay under section 16 of the CIPAA can be made concurrently with an application to set aside an award under section 15 of the CIPAA or whether an application for a stay under section 16 of the CIPAA can only be made after an E application to set aside an award under section 15 of the CIPAA is made.

**Decision Of This Court**

**[6]** This is an appeal on the scope and application of CIPAA, a new legislation which came into force on 15 April 2014. It is noted that CIPAA F was enacted to introduce statutory adjudication to address lengthy payment times that affected the contractors in the construction industry. It is intended as an interim measure to ease the contractors' cash flow. This appeal also focusses on the transitional period when CIPAA came into force and the exclusion from its ambit of claims already commenced, and further the G decision-making process of the adjudicator under CIPAA.

**[7]** The questions posed before this court can be classified and considered under the following three heads. Questions 1 and 2 will be classified and considered as the jurisdictional challenge under s. 41 of CIPAA. Questions 3, 4, 5 and 6 will be classified and considered as the alleged right of the H adjudicator to exclude defences. Questions 7 and 8 will be classified and considered as the setting aside and stay issues.

**[8]** We shall first deal with the jurisdictional challenge under s. 41 of CIPAA. Section 41 seeks to exclude from its application a payment dispute that had been commenced in any court or arbitration as at the date of coming I into operation of CIPAA.

**[9]** The application of s. 41 of CIPAA had been earlier considered and decided by the High Court in the case of *UDA Holdings Bhd. v. Bisraya Construction Sdn. Bhd. & Anor And Another Case* [2015] 5 CLJ 527 which held that CIPAA as a new Act applied retrospectively. The High Court held that CIPAA applies to construction contracts entered into before the coming into force of CIPAA and also to payment disputes that arose before the enforcement of CIPAA.

**[10]** It is significant to note that in the case of *UDA Holdings Bhd*. the KLRCA as the body designated by CIPAA as "the adjudication authority" (see s. 32) had itself propounded that this new Act should apply only to payment disputes that arise after CIPAA has come into force. The High Court in *UDA Holdings Bhd.* held that CIPAA has a full retrospective effect to cover both construction contracts and payment disputes that arose before CIPAA came into force. In the result, it would appear that s. 41 of CIPAA is not only a "saving provision" but also a "transitional provision" as CIPAA has been declared by case-law to apply retrospectively to pre-existing payment disputes.

**[11]** In the present case, we noted that the application of s. 41 of CIPAA was considered fully by the High Court on its merits. Although learned counsel for the respondent seemed to contend that the Court of Appeal had dealt on its merits the s. 41 question, we take the view that the Court of Appeal did not do so. The view taken by the Court of Appeal was a procedural one, namely that the application raising the s. 41 issue should be dismissed *in limine* because it was brought as a separate application and not as an application under s. 15 of CIPAA to set aside the adjudication decision.

**[12]** With respect, we are of the view that the Court of Appeal was wrong as it failed to distinguish between a case where CIPAA did not apply at all and a case where CIPAA applies but the adjudicator acting under CIPAA had exceeded his jurisdiction. Section 15 of CIPAA relates to the latter. Section 15 is predicated on CIPAA applying to the case and to an adjudication decision made under CIPAA. It relates specifically to a complaint that the adjudicator had "acted in excess of his jurisdiction" presupposing the existence of the adjudicator's jurisdiction under CIPAA in the first place.

**[13]** Learned counsel for the respondent contended that a s. 15 of CIPAA challenge can only be made after an adjudication decision is given. There are no provisions in CIPAA which allow a party to seek court intervention in the midst of adjudication.

**[14]** Learned counsel for the respondent fortified his argument that a s. 15 of CIPAA challenge can only be made after an adjudicator's decision is given by making reference to s. 27 of CIPAA as follows:

(a) Section 27(1) of CIPAA limits the jurisdiction of the adjudicator to matters raised in the payment claim and payment response, pursuant to ss. 5 and 6 of CIPAA respectively. Section 27(2) of CIPAA allows for that jurisdiction to be extended by agreement of the parties.

(b) Section 27(3) of CIPAA gives the adjudicator a discretion to proceed with the adjudication even where a jurisdictional challenge has been raised, but preserves the right of the parties to apply to set aside the adjudication decision under s. 15 of CIPAA or to oppose the enforcement of that adjudication decision.

**[15]** We are of the view in substance, the "jurisdiction" spoken of in s. 15(d) of CIPAA are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction. Thus, by s. 27(2) of CIPAA the parties may by consent extend the jurisdiction of the adjudicator to decide on matters outside the claim on which he first acquired jurisdiction. This is possible only if the term "jurisdiction" is used in the sense of CIPAA being applicable in the first place.

**[16]** The term "jurisdiction" under CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of CIPAA. On this point, in *Terminal Perintis Sdn. Bhd. v. Tan Ngee Hong Construction Sdn. Bhd. & Other Case* [2017] 1 LNS 177; [2017] MLJU 242, Lee Swee Seng J observed as follows (at [70]):

> In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word 'jurisdiction' is used in section 15(d) as in the Adjudicator having acted in 'excess of his jurisdiction' as a ground for setting aside an Adjudication Decision. It is also used in section 27(1) with respect to an Adjudicator's jurisdiction being limited to the matters raised in the Payment Claim and the Payment Response. Then there is a reference to it in section 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the Payment Claim and Payment Response. Finally there is the reference to a 'jurisdictional' challenge, which when raised, does not prevent the Adjudicator from proceeding and completing the Adjudication without prejudice to the rights of any party to set it aside under section 15 or to oppose its enforcement under section 28 … Issues as to whether there is a valid cause of action, does not go towards jurisdiction but rather to the merits of the claim …

**[17]** The learned judge also made note of the various types of jurisdictional complaints within CIPAA which may be categorised as core jurisdiction, competence jurisdiction and contingent jurisdiction. The common feature in all of them is the presupposition that CIPAA applies to determine if the adjudicator had kept within his jurisdiction.

**[18]** We are in agreement with the contention of the appellant that the error in the judgment of the Court of Appeal is the failure to recognise that the jurisdictional complaint in the present case is that CIPAA did not apply at all because of s. 41, and not an "excess of jurisdiction" under s. 15, on the basis that CIPAA applied. It is what is termed as an absolute lack of jurisdiction that may be taken up at any time. On this point, the Singapore High Court case of *Chip Hup Hup Kee Construction Pte. Ltd. v. Ssangyong Engineering & Construction Co. Ltd* [2010] 1 SLR 658 had this to say:

> Thus, it seemed that when what was being alleged was an absolute lack of jurisdiction on the part of a particular tribunal or court to hear a particular dispute, 'jurisdiction' being used in the strict sense of capacity to hear, then if the tribunal concerned does not have such jurisdiction, any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so or to have waived its right of protest. On the contrary, when it is a question of irregularity of procedure or contingent jurisdiction or non-compliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the effect of the waiver would not be to create or confer any jurisdiction that did not previously exist.

**[19]** It is our considered view that the appellant had rightly not invoked s. 15 of CIPAA at the beginning in making its application to challenge jurisdiction because it could not on the one hand complain that CIPAA did not apply to the case and yet on the other hand invoke a provision of CIPAA to seek relief. In the circumstances, our answer to question 1 posed in this appeal is in the positive in the first part and negative in the second part.

**[20]** We shall now deal with question 2. Question 2 deals with the merits of the s. 41 issue ie, whether CIPAA applies to the present case in view of the words in the section of a "payment dispute … commenced in any court or arbitration before the coming into operation of the Act".

**[21]** The problem on this issue arises following the decision in the *UDA Holdings Bhd*. that CIPAA applies retrospectively, not only to construction contracts made before CIPAA came into force, but also to payment disputes arising before CIPAA came into operation. In the result, in transitional cases like the present case, a determination has to be made each time under s. 41 of CIPAA whether the exclusion applies.

**[22]** As stated earlier, in the present case the Court of Appeal did not consider the issue on its merits. Both the adjudicator and the High Court had held that s. 41 of CIPAA did not exclude the present claim.

**[23]** The adjudicator merely ruled as follows:

> I find and hold that these CIPAA proceedings can proceed independently **despite previous and/or on-going litigation or arbitral proceedings** and I dismissed the respondent's section 41 challenge. (emphasis added)

**[24]** It is significant that the view taken by the adjudicator was to equate "previous" litigation with "on-going" litigation or arbitration. There was no importance attached to the word "commenced … before" which are the express qualifying words found in s. 41 of CIPAA.

**[25]** The approach taken by the High Court was substantially similar to that of the adjudicator, which is to read s. 41 of CIPAA as applying to "pending claims". The High Court observed as follows:

> In short, the proceedings or the claims must be or is pending in Court or arbitration, in order to be 'saved' or exempted or excluded from the operation of CIPAA 2012. If there are no pending proceedings in Court or arbitration over that particular payment dispute, then it is not 'saved'. It will fall or come within the operation of CIPAA 2012. (See paragraph 36 of the Judgment).

**[26]** Later in the judgment, the above position was reiterated by the High Court as follows:

> The intent behind section 41 is to preserve the law on payment disputes which are already pending in Court or arbitration; and not on all payment disputes. Since the two payment disputes are distinctly different, section 41 does not apply. … Now, in order for the old law to continue to apply or operate, the proceedings which had been commenced must logically, still be pending completion. Otherwise, there would be no need for such a provision in the first place. (See paragraph 45 of the Judgment).

**[27]** We are of the view that the word "commenced" in s. 41 of CIPAA is not the same as the word "pending" which is not found in s. 41 of CIPAA. It also ignores the word "before" in s. 41 of CIPAA. If it was intended by the Legislature that s. 41 of CIPAA should apply to "pending" claims then such word should have been used as seen in s. 16(1)(b) of CIPAA or the word "concurrently" in s. 37(1) of CIPAA in respect of on-going claims. The words "commenced" and "before" as found in s. 41 of CIPAA, therefore have distinct meanings and not equated with the word "pending" found elsewhere in CIPAA.

**[28]** The argument against reading the words "commenced" and "before" as meaning "pending" is strengthened by the context in which the words appear namely "had been commenced …". It refutes any suggestion that the payment dispute must be pending or on-going for it to be excluded. It is our considered view that both the adjudicator and the High Court had read s. 41 of CIPAA wrongly by interpreting the exclusion thereon as applicable to pending payment disputes. This interpretation has narrowed the scope of s. 41 of CIPAA and is contrary to its intended operation as a saving and transitional provision.

**[29]** It is important to note that such interim claims previously and at the time of commencement of CIPAA were claims that could only be brought before the civil court or at an arbitration. The object of a saving provision is clear enough that is not to interfere with existing rights. In *In Re Thompson Bedford v. Teal* [1890] 45 Ch D 161, Cotton LJ observed (at p. 173):

> A saving clause as a general rule is not intended to give power to a corporation or body to do something which they could not otherwise do, but to prevent the enactment from interfering with rights already acquired.

**[30]** A saving provision narrows the application of the new Act and not enlarge it. In *Lim Phin Khian v. Kho Su Ming @ Seng Meng* [1996] 1 CLJ 529 the Federal Court per Edgar Joseph FCJ observed (at p. 538):

> It is a well-known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation.

**[31]** The saving provision is also a transitional provision. It is essentially temporary in duration and would become spent in the course of time in tandem with the new Act which deals with the new circumstances. As observed by the House of Lords in *Britnell v. Secretary of State for Social Security* [1991] 2 All ER 726 per Lord Keith it should not be read "as widening the ambit of the substantive legislation" (at pp. 729-30):

> The purpose of a transitional provision being to facilitate the change from one statutory regime to another, it could not properly be regarded as authorising innovation by widening the ambit of the substantive legislation. As Staughton LJ observed in the Court of Appeal, it is not possible to give a definitive description of what constitutes a transitional provision. In *Thornton on Legislative Drafting* (3rd edn.1987) p. 319 it is said:
>
> > The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force.
>
> One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage.

**[32]** We are of the view it would be sufficient to establish a right of exclusion under s. 41 of CIPAA if the paying party demonstrates that a claim covering the present claim had previously been commenced in court or arbitration. It is based on the fact that in the construction industry progress claims (on which interim certificates are issued) are cumulative in nature and do not exist in separate stand-alone compartments. It is the appellant's case

that this is the position pertaining to the present appeal. On this point in Julian Bailey, *Construction Law* Vol. 1, under the sub-chapter on "progress payment", the learned author observed at para. 6.59 as follows:

> As a matter of presentation, a progress claim may include the value of work previously performed for which payment has been made, even though amounts claimed and previously paid are no longer due and payable.

**[33]** In the contract between the parties here, the progress claims did not stand alone in separate compartments but were cumulative in nature. Learned counsel for the appellant submitted that this can be seen in the Summary Presentation of Progress Claims Nos. 23 to 26 and the related Interim Certificates Nos. 23 to 26R where the description of the contract works, to be noted, remains the same (subject to variation orders) but the amounts claimed vary according to work done to date and payment adjustments to date.

**[34]** It is the appellant's case that Progress Claim No. 28 for the sum of RM23.8 million which is the subject matter of the present payment dispute falls within the exclusion of s. 41 of CIPAA as a claim that "had been commenced in court or arbitration before" the Act came into operation. The basis of this contention is that Progress Claim 28 is cumulative of earlier progress claims contained in Interim Certificates Nos. 23 to 26R, in respect of which action had been commenced in Civil Suit No. 22NCC-405-05/2013 ("the 405 suit"). This was a suit commenced by the respondent in May 2013 against the appellant at the Kuala Lumpur High Court, making a claim for RM12,860,689.02 under the present contract, based on Interim Certificates Nos. 23 to 26R.

**[35]** It is our judgment that s. 41 of CIPAA applies to exclude the respondent's claim under Progress Claim 28 for RM23.8 million under CIPAA. The matter falls under the words 'commenced' and 'before' in s. 41 of CIPAA and therefore applies to exclude the application of CIPAA to the respondent's claim.

**[36]** For the above-stated reasons, we would answer question 2 posed in this appeal in the affirmative.

**[37]** We shall now deal with questions 3 to 6 posed in this appeal. These questions relate to whether the adjudicator has the right to exclude the defences of the appellant. The adjudicator excluded for consideration three vital defences raised by the appellant as the respondent in the adjudication process. They were in the nature of set-off and cross-claims towards reduction of the respondent's payment claim of RM23.8 million. The excluded defences were:

(i) the fact of the advance of RM2 million to the respondent;

(ii) defective works and the cost of rectification; and

(iii) encroachment into the adjoining land by the flyover bridge causing damage.

**[38]** The adjudicator justified the right to exclude for consideration three defences as they were not stated as reasons in the first payment response under s. 6 of CIPAA, though pleaded in the adjudication response before him under s. 10 of CIPAA. The adjudicator had evidently excluded the defences, relying on s. 27(1) of CIPAA, as a matter of jurisdiction. Section 27(1) reads as follows:

> **Jurisdiction of adjudicator**
>
> 27(1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

**[39]** The High Court agreed with the adjudicator and held that ss. 5 and 6 of CIPAA are determinative of jurisdiction, and that the adjudicator's jurisdiction did not extend to matters in the adjudication claims and the adjudication response or even the adjudication reply found in ss. 9 to 11 of CIPAA. (See para. 60 of the High Court judgment).

**[40]** The High Court justified its conclusion by reasoning out that the adjudication pleadings under ss. 9 to 11 of CIPAA are merely "manifestations" of the matters in ss. 5 and 6 of CIPAA. In the words of the High Court:

> the whole adjudication process that takes place after that from the appointment of the Adjudicator to the filing of the Adjudication Claim, the Adjudication Response and the Adjudication Reply are substantially formal manifestations of the dispute containing greater details of the claim, response or reply, as the case may be of the first Payment Claim and Payment Response.

The Court of Appeal agreed fully with the High Court.

**[41]** With respect to the above reasoning of the High Court, it is untenable to reduce the adjudication pleadings in ss. 9 to 11 of CIPAA to mere "formal manifestations" of the dispute. If it were so, and speed is the overriding consideration under CIPAA, it would be easier for the legislative draftsman to dispense altogether with adjudication pleadings and proceed purely on the statements contained in the payment claim and the payment response under ss. 5 and 6 of CIPAA.

**[42]** We are also doubtful if mere changes in the adjudication pleadings from the time of the first documents under ss. 5 and 6 of CIPAA would delay the process because of the strict timeline of a ten-day period for parties to

A respond to each other's pleadings, and of the adjudicator's timeline to deliver his decision within 45 working days from the last date of the documents being filed.

**[43]** It should also be noted that while the payment response under s. 6(2) of CIPAA requires the non-paying party to merely state "amount disputed
B and the reasons for the dispute" the adjudication response under s. 10 of CIPAA on the other hand requires the respondent to "answer the adjudication claim". The latter, is in our view is in the nature of a legal response with the obligation to "answer" imposed by a statute, to mean a real opportunity to defend a claim, and not something illusory.

C

**[44]** It should be noted that on the claimant's side, the adjudication claim under s. 9(1) of CIPAA requires the unpaid party to state "the nature and description of the dispute and the remedy sought" whereas the preceding payment claim under s. 5 of CIPAA merely requires him to state the amount claimed and the contract involved sufficient to "identify the cause of action."

D

**[45]** It needs to be emphasised here that the adjudication response under s. 10(1) of CIPAA requires the non-paying party to "answer the adjudication claim" meaning the "nature and description of the dispute and the remedy" as claimed by the claimant in its adjudication claim. It is also significant to
E note that it is at this stage of the proceedings that the unpaid party is termed by the CIPAA as "the claimant", and the non-paying party as "the respondent", by which terms they are thereafter respectively referred to. It comes about after the "initiation of adjudication" under s. 8 of CIPAA where an adjudicator is appointed signifying the start of the adjudication process. The adjudication pleadings under ss. 9 to 11 of CIPAA comes after this and
F before the adjudication hearing begins under s. 12 of CIPAA.

**[46]** We are of the considered view that the scheme of the two-stage process under CIPAA does not warrant giving a reduced importance to the adjudication pleadings and a greater, if not overriding, significance given to the initial documents under ss. 5 and 6 of CIPAA.

G

**[47]** Learned counsel for the appellant impressed upon us that there is no express power given to the adjudicator to reject "new" defences because they did not appear in the payment response, unlike, for example, in the counterpart legislation in Singapore and Australia (NSW).

H **[48]** In Singapore under s. 15(3) of the Building and Construction Industry Security of Payment Act 2006 ("S'pore Act 2006") the adjudicator is expressly empowered not to consider "any reason" for withholding payment unless "the reason was included in the relevant payment response". Section 15 of the S'pore Act 2006 comes under "Adjudication Response", equivalent
I to our s. 10 of CIPAA but has this additional subsection:

(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless:

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or …

**[49]** The Singapore Court of Appeal in dealing with this sub-s. (3) of s. 15 of S'pore Act 2006 in *W Y Steel Construction Pte. Ltd. v. Osko Pte. Ltd.* [2013] 3 SLR 380 held that it was a jurisdictional provision entitling the adjudicator to disregard grounds not originally stated by the respondent in his payment response. The Singapore Court observed as follows:

In our judgment, section 15(3) is jurisdictional in the sense that it curtails the power of an adjudicator to allow a respondent to raise new grounds for withholding payment that were not included in his payment response and, for that matter, an adjudicator's power even to consider such grounds at all. This is literally what the provision provides and we should, in our view, give proper effect to it.

**[50]** The Australian (NSW) provision similar to the Singapore provision is s. 20(2B) of the New South Wales Building and Construction Industry Security of Payment Act 1999 which reads:

The respondent **cannot include** in the adjudication response any reasons for withholding payment **unless** those reasons have **already been included** in the payment schedule provided to the claimant. (emphasis added).

In *Multiplex Construction Pty. Ltd. v. Luikens & Anor.* [2003] NSWSC 1140, the NSW Supreme Court read the provision as entitling the adjudicator to prevent the respondent from relying on reasons not stated in the initial response. The court observed as follows:

If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, section 14(3) requires that that reason be indicated in the payment schedule and section 20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, section 22(d) requires the adjudicator to have regard only to those submissions which have been 'duly made' by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s. 14(3).

**[51]** In the present case, the right to disregard the so-called new grounds is not based on any express power vested in the adjudicator as in Singapore or Australia but solely by a reliance on s. 27(1) of CIPAA which says the jurisdiction "in relation to any dispute is limited to the matter referred to the

adjudicator pursuant to ss. 5 and 6". There is therefore the need to determine the scope of the jurisdictional limitation under s. 27(1) of CIPAA and whether it justifies the adjudicator to exclude defences raised by a respondent.

**[52]** In the context and application of s. 27(1) of CIPAA, the distinction between "jurisdiction" and "powers" must be recognised. It is trite that they mean different things when both words appear in the same statute as it does in the present Act. On this point in *Lee Lee Cheng v. Seow Peng Kwang* [1960] 26 MLJ 1, Thomson CJ observed at p. 3:

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

**[53]** The significance of the divide between "jurisdiction" and "powers" lies in the fact that "jurisdiction" relates to "the types of subject matter which the court may deal with" whereas its powers may be exercised only in relation to that jurisdiction.

**[54]** The principle that jurisdiction is about subject-matter applies to every statute. Thus, CIPAA applies only to "construction contracts" as defined under the Act (see ss. 2, 3 & 4) and that the "payment dispute" must arise under a construction contract. These are fundamental jurisdictional premises for CIPAA to apply. Sections 5 and 6 of CIPAA relate to this. Section 5 of CIPAA speaks of a "payment pursuant to a construction contract". By s. 4 of CIPAA, "payment" is defined as "payment for work done … under the express terms of a construction contract". The response under s. 6 of CIPAA has to be in relation to the "payment" claim under ss. 4 and 5 of CIPAA as to whether it is admitted or disputed.

**[55]** By s. 27(1) of CIPAA, the arbitrator's jurisdiction "is limited to the matter referred to adjudication" pursuant to ss. 5 and 6 of CIPAA. It refers to the "identification of the cause of action" in relation to the construction contract as required under s. 5(2)(b) of CIPAA. In turn, the payment response under s. 6 of CIPAA is defined and limited by the claim under s. 5 of CIPAA.

**[56]** In short, s. 27(1) of CIPAA refers to the subject matter of the claim under s. 5 of CIPAA, which is the "cause of action" identified by the claimant by reference to the applicable clause of the construction contract. Thus if the payment claim relates to Progress Claim No. 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to Progress Claim No. 28.

**[57]** It can thus be said that the appellant's case regarding the jurisdiction referred to in s. 27(1) of CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract. By s. 27(2) of CIPAA, the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim.

**[58]** In contrast to jurisdiction, the "powers" of the adjudicator are listed in ss. 25 and 26 of CIPAA under the specific heading of "Powers of the Adjudicator". It follows that an adjudicator may exercise all or any of the powers under ss. 25 and 26 of CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject-matter referred to him pursuant to ss. 5 and 6 of CIPAA.

**[59]** We are of the view that in the absence of a prohibitory clause similar to s. 15(3) of the Singapore Act 2006 and a similar restriction as above-mentioned the NSW legislation, there is no impediment for the adjudicator to consider all the grounds of claim in an adjudication claim under s. 9 of CIPAA, and all the grounds of defence in an adjudication response under s. 10 of CIPAA.

**[60]** The impact of s. 6(4) of CIPAA should also be considered. The provision states that if a non-paying party fails to respond to the payment claim served on him he is "deemed to have disputed the entire payment claim". The High Court in the present case treated s. 6(4) of CIPAA as something equivalent to an anti-default judgment provision which merely gives "comfort" to the respondent (see para 67 of judgment). With respect, we are of the view that the approach of the High Court fails to give due regard to the section as a "deeming" provision in legislation. The word "deemed" used in a statutory provision is a legislative presumption of something having happened although it did not. It is a statutory fiction given reality by law. In *St. Aubyn (L.M.) & Ors. v. Attorney General (No. 2)* [1951] 2 All ER 473, Lord Radcliffe observed at p. 53:

> The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

In relation to something not done, the word "deemed" would have the meaning given by James LJ in *Ex p Walton* [1881] 17 Ch. D 746 which read as follows:

> When a statute enacts that something should be 'deemed' to have been done which, in fact and truth, was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

**[61]** We are of the considered view that the High Court has wrongfully reduced the significance of the "deeming" effect in s. 6(4) of CIPAA. Further, the interpretation that s. 6(4) of CIPAA would only entitle the respondent to dispute the claim as it stands, and not raise any positive defence, is to whittle down the effect of the deeming provision.

**[62]** Useful reference can also be made to the observation of learned authors of Lam Wai Loon and Ivan Y.F. Loo in *Construction Adjudication in Malaysia* (KL CCH Asia 2013) wherein they observe at p. 150 that the effect of s. 6(4) of CIPAA is that it does not prevent the respondent from submitting any defence available to him by way of an adjudication response.

**[63]** It must also be noted that CIPAA does not require the participation of lawyers in the system devised. By s. 8(3) of CIPAA parties may represent themselves or be represented by "any representative". Thus, by ss. 15 and 24 of CIPAA there is a safeguard which declares that the adjudicator shall conduct himself with fairness, impartiality and due observance of the rules of natural justice.

**[64]** It follows that the "duty and obligation of the adjudicator" as spelt out in s. 24(c) of CIPAA that "he shall comply with the principles of natural justice" would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality.

**[65]** We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd. v. Breyer Group plc* [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by Justice Coulson bears close reading. At [24-28] the learned judge observed:

24. It seems to me clear beyond doubt that the adjudicator erred in failing to take into account Breyer's defence by reference to the over-payment on batches 1-25. Whilst he was quite correct to regard the notice of adjudication as setting out the boundaries of his jurisdiction, he failed to appreciate that what Pilon were seeking by that notice was not only an interim valuation of batches 26-62, but also an interim payment of any sum considered owing to them. Whilst the valuation required him to have regard to batches 26-62 only, the concomitant claim for payment meant that the adjudicator was obliged to consider whether Breyer were right to say that a much smaller net payment was due than that contended for by Pilon, because Pilon had already been overpaid on batches 1-25. In other words, the notice of adjudication gave the adjudicator the jurisdiction to consider what, if any, further sum should be paid by way of interim payment from Breyer to Pilon and that issue, of necessity, involved a consideration of Breyer's defence based on the alleged over-payment on batches 1-25.

25. It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in Broardwell. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

26. As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

27. I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage. I am in no doubt that is what happened here: Pilon did not wish the adjudicator to have any regard to batches 1-25, and therefore deliberately limited the scope of the adjudication notice to batches 26-62. It was their case that the over-payment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where Pilon sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

> 28. In the result therefore, I consider that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice …

**[66]** Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our case, wrongly construed the scope of his jurisdiction under s. 27(1) of CIPAA in refusing to consider all the defences raised in the adjudication response. Therefore such a decision by the adjudicator cannot stand.

**[67]** On the applicability of *Pilon Ltd*'s case to the present case, learned counsel for the respondent contended that the adjudicator in England is not constrained by a s. 27(1) of CIPAA like provision on his jurisdiction. *Pilon Ltd* was decided based on the English Housing Grants, Construction and Registration Act 1966 ("HGCR Act"). The adjudication provisions of the HGCR Act are contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("Scheme"). Regulation 20 of the Scheme expressly allows the adjudicator to take into account any other matter which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute.

**[68]** Learned counsel for the respondent also submitted that there is no requirement for the equivalent of a payment claim and payment response in England. The adjudication is commenced by a notice of adjudication. (See reg. 1 of the Scheme). It is because the adjudicator was obliged under reg. 20 of the Scheme to consider matters "necessarily connected with the dispute" that the court in *Pilon Ltd* found the adjudicator to have wrongfully excluded for his consideration the overpayment on batches 1-25 in his valuation of batches 26-62.

**[69]** It is the respondent's contention that in any event in *Pilon Ltd*, the valuation of batches 26-62 is an accounting of the value of work done against sums paid. Previous payments, including that for batches 1-25, must be considered. The present case is quite different wherein the appellant is seeking to include cross-claims that were not raised in its payment response under s. 6 of the CIPAA.

**[70]** With respect to the above arguments advanced for the respondent on the applicability of *Pilon Ltd* to the present case, we are of the considered view that it is incorrect to suggest, as the respondent did, that because of reg. 20 of the Scheme the adjudicator has wider power under the HGCR Act, and that *Pilon Ltd* cannot apply. Regulation 20 in full states:

> **Adjudicator's decision**
>
> 20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which **he considers are necessarily connected with the dispute.** In particular, he may:

(a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,

(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid. (emphasis added)

**[71]** We are in agreement with the submission of learned counsel for the appellant that reg. 20 of the Scheme is about the powers of the adjudicators in making their decision and not their jurisdiction. Under the HGCR Act, the adjudicators first have to determine their jurisdiction by reference to the scope of the "dispute" that is referred to them. That relevant part of the HGCR Act and the Scheme that was under consideration in *Pilon Ltd* was reg. 1 which provides:

**Notice of Intention to seek Adjudication**

1(1) Any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") of his intention to refer any dispute arising under the contract, to adjudication.

(2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly:

(a) the nature and a brief description of the dispute and of the parties involved,

(b) details of where and when the dispute has arisen,

(c) the nature of the redress which is sought, and

(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

**[72]** This means that the adjudicator must look to the "notice of adjudication" to first determine the jurisdiction of the dispute that is referred to them. This is made clear in *Pilon Ltd* itself as at paras. 24 and 25 of the judgment. It is also incorrect to say that the present case is different from *Pilon Ltd* because *Pilon Ltd* was dealing with an accounting of previous payments. In *Pilon Ltd* the excluded defence was one of overpayment and an accounting of what was due. In the present case before the court, one of the appellant's excluded defences was an overpayment of RM2,000,000 which was not accounted for.

**[73]** It is noted that in the supporting judgment in the Court of Appeal of Prasad Sandosham Abraham JCA (as he then was) the learned judge held that s. 26(2)(c) of CIPAA could have been invoked by the appellant to amend his case before the adjudicator. On this point, we are of the view that this remedy was not necessary on the facts of the present case because the adjudication response was "a document produced in the adjudication proceedings" under the said section and it had carried all the defences sought to be relied on by the appellant. It did not call for any amendment.

**[74]** For the reasons above stated, it is our considered view that an adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s. 6 of CIPAA or not. In the circumstances of this case, the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason.

**[75]** We shall now deal with questions 7 and 8 relating to the setting aside and stay issues. Questions 7 and 8 relate to the interplay between ss. 15 and 16 of CIPAA. Question 7 deals with the court's powers under s. 16 of CIPAA. Question 8 deals with the timing of an application under s. 16 of CIPAA.

**[76]** The High Court in the present case held that an application under s. 16 of CIPAA can only be allowed in exceptional circumstances. These exceptional circumstances were then described as necessarily relating "to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes".

**[77]** The reasoning adopted by the High Court for such a stringent test was that it took into account the object and purpose of CIPAA to provide for quick payment through adjudication and that it was the approach favoured by the courts in England, Australia and Singapore. The court placed much emphasis on the decision of the Singapore Court of Appeal in *WY Steel Construction Pte. Ltd.*.

**[78]** The Court of Appeal in the present case adopted a similar approach. It said that unless there was "overwhelming evidence" that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted.

**[79]** We are of the view that such a stringent test is not justified under CIPAA because s. 16 of CIPAA itself contains no such limiting requirement or intent. Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.

**[80]** It is to be noted that after a review of the legislation in the other jurisdictions, the scheme in each jurisdiction is different. Other jurisdictions do review the adjudication awards, and where appropriate, deny enforcement in whole or in part. It can be seen as follows:

(a) In England, statutory adjudication is governed by the HGCR Act and the Scheme and the Arbitration Act 1996. Under reg. 24 of the Scheme an order of the adjudicator may be enforced by reference to s. 42 of the UK Arbitration Act. At the application for enforcement, the responding party may seek to resist the enforcement on the grounds of want of jurisdiction of the adjudicator or a breach of natural justice.

(b) In Australia, different States have different statutory adjudication schemes. In the State of Victoria in Australia where there is a failure to respond to a payment claim, the claiming party must apply for leave to enter judgment at which point a court can review the claim. There is a provision for a court-based review of the adjudicator's decision. Apart from that, judicial review or *certiorari* is available to challenge any adjudication decision. This includes challenging an adjudication decision by using *Wednesbury* unreasonableness. Importantly, Victoria, Australia, provides for an automatic stay after an adjudication decision, on the launching of arbitration to challenge the award subject to security being provided by the responding party.

(c) In New Zealand, the scheme is again different under the Construction Contracts Act 2002. Here the claiming party is entitled to seek statutory adjudication on progress payment. Those progress payments are statutorily defined under s. 17 of the Act to include an accounting of defective works and liquidated ascertained damages. Once an adjudication decision is delivered, s. 73 of the Act sets out the steps for applying to court for judgment for enforcement of the award. This is apart from the right of the responding party to seek judicial review against the award.

(d) In Singapore, there is a specific provision under s. 18 of the S'pore Act 2006 which allows for review of adjudication awards. It is after the review process concludes that the claiming party must then apply to court for an order of enforcement.

**[81]** From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. CIPAA contains no such restriction.

**[82]** We are in agreement with the contention of the appellant that a more liberal reading of s. 16 of CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However to restrict the application of s. 16 of CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.

**[83]** It is our considered view that on the facts of this case that the appellant was deprived of three of its defences. Of the three at least two defences relate directly to the amount that was being claimed by the respondent. Those are:

(a) the undisputed advance payment of RM2,000,000; and

(b) the cost of rectification of defective works in the amount of RM1,300,000.

**[84]** The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. With respect we are of the view that the correct approach for the High Court under s. 16 of CIPAA would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor.

**[85]** As regards question 8, the Court of Appeal held that an application under s. 16 of CIPAA for stay could only be made after the filing of an application under s. 15 of CIPAA. We are of the view that the Court of Appeal fell into error here when it failed to consider that the application for stay was made under s. 16(1)(b) and not s. 16(1)(a) of CIPAA. In any event, s. 16(1)(a) specifically provides that the parties may apply for a stay once an application to set aside an award under s. 15 of CIPAA has been made. It does not say that the application must be made separately. It is clear that the provision is there in aid of an application under s. 15.

**[86]** It is wholly appropriate that an application for stay under s. 16 of CIPAA be filed together with an application to set aside an award under s. 15 of CIPAA as a matter of practical utility for the High Court to make the appropriate order in a joint consideration of both.

**[87]** For these reasons, it is our view that questions 7 and 8 should both be answered in the affirmative.

## Conclusion

**[88]** For all the above reasons, the appeal of the appellant is allowed with costs. The orders made by the High Court and affirmed by the Court of Appeal are hereby set aside. The appellant's application to challenge the jurisdiction of the adjudicator under the provision of s. 41 of CIPAA is allowed. The appellant's application to set aside and/or stay the award pursuant to ss. 15 and 16 of CIPAA is also allowed. The respondent's application seeking the registration and enforcement of the adjudication decision as a judgment of the court pursuant to s. 28 of CIPAA is dismissed. Deposit is to be refunded to the appellant.